SUPREME COURT, U.S.
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No. 93-1194

In The

# Supreme Court of the United States

October Term, 1993

LAWRENCE L. BINKLEY,

*Petitioner,*

v.

CITY OF LONG BEACH, a municipal corporation, and JAMES C. HANKLA, City Manager of the City of Long Beach,

*Respondents.*

**On Petition For Writ Of Certiorari To The Court Of Appeal Of the State Of California, Second Appellate District, Division Two**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## REBUTTAL TO PETITIONER'S CHARACTERIZATION OF QUESTION PRESENTED

The question presented can, of course, only be analyzed in relation to the facts as actually examined below. The petitioner was the Chief of Police of the City of Long Beach. He was an *at-will* employee serving at the pleasure of the City Manager (Hankla) and therefore was subject to dismissal without cause. An administrative hearing was provided to him pursuant to *state* law and was conducted in a manner which petitioner's own counsel conceded to be fair. Although petitioner was not permitted to cross-examine witnesses he *was* allowed to present independent evidence and was given a full opportunity to make a formal record of the circumstances surrounding his termination and to clear his name. The question presented is in fact as follows. Did the process afforded to the petitioner, found to have fully complied with state law, nevertheless violate the petitioner's right to a liberty interest hearing?

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## STATEMENT OF THE CASE

The facts giving rise to this litigation are fully recited in the opinion of the Court of Appeal. In pertinent part,

> "The City is a charter city, governed by the 'home rule' provisions of article XI, section 5 of the California Constitution. Under the City's charter, the city manager is charged with the responsibility for the administration of most of the City's departments, including the police department. (Long Beach City Charter, art. III, § 300.) The city manager's powers and duties include the appointment, suspension and removal of all City employees in the unclassified service. (Long Beach City Charter, art. III, § 301.) Department heads, including the chief of police, are members of the unclassified service and serve at the pleasure of the city manager. (Long Beach City Charter, art. XI, § 1102, subd. (a)(5).)" Petition, App. 2a-3a.

In December of 1991, Hankla decided to conduct a review of petitioner's performance as Chief of Police. At the conclusion of that review, petitioner was informed in writing that Hankla was:

> " 'satisfied that there is not sufficient evidence to conclude that you have engaged in any act of wrongdoing.'[1] The letter further stated:

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[1] It is important to emphasize that Hankla did not propose to discharge the petitioner because of acts characterized as wrong doing. Rather, the acts described in Hankla's letter of February 14, 1992 (App. 7a-8a), and Dr. Schoendorf's findings of February 28, 1992 (App. 8a-9a), would more properly be characterized as an inability or unwillingness to follow the orders of his superior (Hankla) or to interact with other management employees in a manner suitable to Hankla.

> 'However, I have, in the course of this review, discovered instances in which you have exercised questionable judgment. Further, a substantial number of your command staff have come forward to criticize your leadership, and you have, by your actions, subjected yourself to criticism from City management. As a consequence, I have lost confidence in your ability to lead the Long Beach Police Department. I am, therefore, removing you from the position of Chief of Police.' " App. 6a-7a.

The petitioner thereafter demanded an administrative appeal pursuant to the Public Safety Officers Procedural Bill of Rights Act (California Government Code, sections 3300 *et seq.*).

Hankla replied by letter, acknowledging readiness for the hearing and identifying Dr. Judson Schoendorf as the hearing officer. In that letter Hankla advised the petitioner that:

> "at the administrative appeal hearing, he would 'be given an opportunity to establish a formal record of the evidence which would either tend to show that the allegations are false or that mitigating circumstances should be taken into consideration.' Thereafter, the letter advised, Dr. Schoendorf would direct a report to Hankla advising him of his factual findings. However, Hankla was to retain 'the final decision making authority pursuant to [his] responsibilities under the Charter.'
>
> (Petitioner's) administrative appeal hearing was heard by Dr. Schoendorf on February 27, 1992. Only (petitioner) testified at the hearing. . . .

(Petitioner) objected to the limited scope of the hearing, and Hankla's retention of final decision making authority, as outlined in Hankla's letter of February 14, 1992. He demanded, but was refused the opportunity to cross-examine the individuals whose statements formed the evidentiary basis for Hankla's findings of misconduct. . . .

On February 28, 1992, Dr. Schoendorf issued his written findings. . . . (He) concluded that the decision to discharge (petitioner) should be sustained based upon the 'breach in morale,' as well as 'differences in leadership and management style.'

On March 2, 1992, (petitioner) was advised by letter that Hankla had received and fully reviewed the report of Dr. Schoendorf, and that Hankla's decision to remove him from the position of chief of police, effective February 14, 1992, remained unchanged." App. 8a-9a.

## ARGUMENT

### A. The Constitutional Question Presented Is Not Substantial, Based Upon Previous Holdings Of This Court

To afford a basis for review, the federal question must be substantial. (See *Zucht v. King*, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 [1922]; *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 68 L.Ed. 382, 44 S.Ct. 197 [1924].) This court in *Zucht, supra,* held that:

Although the validity of a law was formally drawn in question, it is our duty to decline

> jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character. 260 U.S. 176, citing *Sugarman v. United States*, 249 U.S. 182, 184, 63 L.Ed. 550, 39 S.Ct. 191 (1919).

The petitioner herein, an at-will employee, subject to dismissal without cause and therefore holding no property right to continued employment, challenges the hearing process on due process grounds.

First, it should be emphasized that there is *nothing* in the record to support the proposition that he was not allowed to present independent evidence. In fact, the contrary is the case, as he was permitted to "establish a formal record of the evidence which would either tend to show that the allegations are false or that mitigating circumstances should be taken into consideration" (App. 8a). That he chose only to testify does not in any way alter the fact that he had the right to introduce independent evidence had he chosen to do so.

It is true that the City Manager retained his authority, pursuant to the state constitution and as mandated by City Charter, to make the final decision concerning the continued employment of the petitioner. There is, however, absolutely no authority cited by the petitioner to suggest that under these circumstances the petitioner's liberty interest under the Fourteenth Amendment mandates a separate final decision maker. To so require would engraft a "for cause" hearing right which the petitioner admittedly does not enjoy. The critical distinction here, as well as with respect to the issue following, is that the

petitioner had no property right to continued employment. In this regard, those cases cited by petitioner dealing with a property interest are inapposite.

It is further true that he was not permitted to cross-examine witnesses. Yet this court has never, expressly or impliedly, required that this right attaches to a liberty interest hearing. Rather, in *Mathews v. Eldridge*, 424 U.S. 319, 334, 47 L.Ed.2d 18, 32-33, 96 S.Ct. 893 (1976), this court underscored the fact that due process is flexible and calls for such procedural protections as a particular situation demands. In *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), the court stated that the purpose of the hearing is to supply the opportunity to clear ones name. See also, *Codd v. Velger*, 429 U.S. 624, 627, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977).

Admittedly, this court has not attempted to articulate a specific set of standards to govern a liberty interest hearing. This is, however, as it should be, since the individual cases are driven by a factual analysis of whether, under the circumstances, the employee was given a fair opportunity to clear his name. This issue is very separate from the analysis necessary where the due process hearing involves a property interest in continued employment. In the latter case, the ability to cross-examine witnesses could well be fundamental to the right to establish a basis or *cause* for dismissal.

The petitioner was provided with an opportunity to clear his name. He was given the process he was due.

### B. The State Appellate Court Decision Was Based On Independent And Adequate State Law And Therefore This Court Should Decline To Exercise Jurisdiction

The predominant focus of the Court of Appeal encompassed an analysis of state law – the Public Safety Officers Procedural Bill of Rights Act (California Government Code, sections 3300, *et seq.*). The act purports to provide for procedural due process to public safety officers. The court found, pursuant to the Act and state case law interpreting same, that an at-will employee such as the petitioner is covered by the Act and that the City acted in conformity with state law in the process it employed. There was, it is submitted, a fully independent and adequate state law basis for the appellate court's decision.

Further, the petitioner failed to raise or adequately present a claim of violation of due process on grounds that petitioner was not allowed to cross-examine witnesses during the name-clearing hearing. Petitioner failed to provide any supporting authorities to the Court of Appeal, which opined that:

> Respondent has failed to cite a single case which supports his claim that due process mandates that he be given an opportunity to confront and cross-examine the witnesses at a trial-type, evidentiary hearing . . . There is, however, authority supporting the position taken by appellants, that there is no right of cross-examination at a name clearing hearing. [citations]. App. 17a-18a.

It is a long-settled rule that the jurisdiction of this court to reexamine the final judgment of a state court can

arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496, 68 L.Ed.2d 392, 397, 101 S.Ct. 1889 (1981).

Despite petitioner's failure to provide authorities concerning the right of cross-examination during a name-clearing hearing, the Court of Appeal relied on four (4) state law cases construing the right to administrative appeal for an at-will peace officer and concluding that there was no right to cross-examination. (App. 17a-18a). The state court thus expressly relied on independent state grounds for its decision. This Court should therefore decline to review.

## CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain his burden of demonstrating that review is warranted. The petitioner was given the process he was due, consistent with previous holdings of this court. Further, the state appellate court decision was explicit in setting forth the separate and independent grounds upon which it based its decision. The decision indicates with requisite clarity that the due process afforded to petitioner complied with the mandates of state law. This court should, therefore, decline to review the judgment as it rests on adequate non-federal grounds.

Based upon all of the foregoing, the Petition should be denied.

Respectfully Submitted,

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